HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M61 of 2021

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

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and

THE STATE OF VICTORIA
Defendant

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DEFENDANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The questions arising in the proceeding for the opinion of the Full Court are (Amended Special Case Book (**ASCB**) 49-50 [81]):

    2.1. Is s 7(1) of the *Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic) (**Act**) invalid on the basis that it imposes a duty of excise within the meaning of s 90 of the Constitution?

    2.2. Who should pay the costs of the proceeding?

10 3. The defendant (**Victoria**) submits that the first question should be answered "No", and the second question should be answered "The plaintiffs".

PART III: SECTION 78B NOTICES

4. Notice has been given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

5. The material facts are recorded in the special case (ASCB 36-50).

PART V: ARGUMENT

A. SUMMARY

6. A duty of excise for the purposes of s 90 of the Constitution is a tax "on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin".[1]
20 Properly characterised, the charge imposed by s 7(1) of the Act (**ZLEV charge**) does not meet this definition, for two reasons:

    6.1. *First*, it is not a tax "on goods", but rather a tax on the activity of driving a zero or low emission vehicle (**ZLEV**) on a "specified road" as defined in s 3 of the Act (**Part B**).

    6.2. *Second*, even if the ZLEV charge is a tax "on goods", it is not a tax on the "production, manufacture, sale or distribution of goods", but rather a tax on the use or consumption of goods. In accordance with longstanding authority, including *Dickenson's Arcade Pty Ltd v Tasmania*, such a tax is not a duty of

[1] *Ha v New South Wales* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ) (**majority**).

excise for the purposes of s 90.[2] *Dickenson's Arcade* should not be re-opened (**Part C**).

7. If the Court accedes to the application to re-open *Dickenson's Arcade*, it should affirm that decision (**Part D**). Alternatively, the Court should reconsider the proper construction of s 90 more fundamentally, and find that an excise is a tax that falls selectively upon locally produced goods, consistently with the view of the minority in *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]*[3] and *Ha v New South Wales*.[4] As the ZLEV charge does not so fall, it is not an excise (**Part E**).

B. THE ACT

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B.1 The scheme of the Act

8. The purpose of the Act is "to require registered operators of [ZLEVs] to pay a charge for use of the vehicles on certain roads" (s 1). The ZLEV charge is imposed on a periodic basis, in respect of the use of a ZLEV on "specified roads" (s 7(1)).

9. The calculation of the ZLEV charge is based on the kilometres travelled on "specified roads" during each financial year (s 8(1)). "Specified roads" is defined exhaustively and does not include private roads (s 3). The rate of the charge over the last financial year was 2.5 cents per kilometre for hydrogen vehicles or electric vehicles (such as the vehicle owned by the First Plaintiff) and 2.0 cents per kilometre for plug-in hybrid electric vehicles (such as the vehicle owned by the Second Plaintiff) (s 8(1)(a), ASCB 37 [6.1],

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39 [23.1]). The charge is ordinarily levied following the conclusion of an annual registration period, at which point the registered operator must declare the total distance travelled by the ZLEV, excluding any travel on roads that are not "specified roads" (s 11(1) and (3)).

B.2 The ZLEV charge is a tax on an activity, not a good

10. The ZLEV charge has several characteristics that make it markedly different to those charges previously held to be an excise (and therefore a tax on goods). *First*, the ZLEV charge is not imposed during the production process or at the point of sale, but on the user of the ZLEV substantially after the point of sale (ss 7(1), 11, 15 and 18). *Second*, liability to pay the ZLEV charge is assessed periodically over the duration of the ZLEV's

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[2] (1974) 130 CLR 177 at 185-186 (Barwick CJ), 209, 213 (Menzies J), 217-223 (Gibbs J), 229-231 (Stephen J), 238-239 (Mason J); cf 196, 204 (McTiernan J).

[3] (1993) 178 CLR 561.

[4] (1997) 189 CLR 465.

registration. *Third*, the amount payable is calculated not by reference to the value (or quantity) of the ZLEV, but by reference to the distance driven on "specified roads". No charge will be payable in respect of a given year if a ZLEV is not driven on "specified roads" during that period (because it is not driven, or is only driven on roads that are not "specified roads"). A ZLEV that is only driven on private roads — for example, on such roads on agricultural properties or mining sites — will never incur the charge.[5] A charge of this kind, imposed periodically after the point of sale and incurred only if a person engages in a specific activity involving use of the good, bears no resemblance to any charge previously considered by this Court to be a tax on goods, let alone an excise.

10 11. Both the terms in which the ZLEV charge is imposed by the Act and the practical operation of the scheme also mean that it is not properly characterised as a tax on the use of a ZLEV. Rather, it is a tax levied upon the activity of driving a ZLEV on "specified roads" (ss 1 and 7(1)), calculated according to the number of kilometres the ZLEV is driven on such roads annually (ss 8(1), 11(3)(b) and 15(1)). As the ZLEV charge is not a tax on goods, it is not an excise.

12. The matters raised by the plaintiffs and the Commonwealth do not detract from the characterisation of the ZLEV charge as a tax on an activity.

13. The submission that the Act discriminates against ZLEVs does not assist in characterising the charge for the purposes of s 90 (PS [52]; CS [48]). In circumstances where registered
20 operators of ZLEVs "pay little or no fuel excise", the Victorian Parliament has chosen to introduce a tax intended to remedy the substantial disproportion in road-user charges that would otherwise occur.[6]

14. Further, the definition of "specified roads" is broad by design. The exclusion from the scheme of roads that are not "specified roads" is not an attempt to avoid the operation of s 90 by a drafting device (cf PS [62]), but rather reflects a deliberate legislative choice to levy the charge by reference to the use of public roads. Similar legislative schemes enacted in New South Wales and South Australia have fields of application that are at least as broad, and also operate extraterritorially.[7] The breadth of the definition of

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5 See Act, s 3 (definition of "specified road"), paras (a), (b), (c) and (e).

6 See Victoria, *Hansard*, Legislative Assembly, 18 March 2021 at 1183; ASCB 64. See also, by way of analogy, *McCloy v New South Wales* (2015) 257 CLR 178 at [197] (Gageler J): "Parliament is not relegated … to resolving all problems … if it resolves any", but "can respond to felt necessities".

7 See *Electric Vehicles (Revenue Arrangements) Act 2021* (NSW), ss 6, 11(1)-(3) (applying to all kilometres other than those travelled on private land); *Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021* (SA), s 8 (applying to all kilometres travelled "on roads and road related areas (whether within or outside

"specified roads" does not mean that the concept lacks identifiable and meaningful limitations (see [11] above; cf PS [54.1], [56]-[58], [60]-[62]; CS [44]-[45]).

15. Finally, the plaintiffs' assertion that it would be unduly burdensome for a registered operator of a ZLEV to record evidence of exempt kilometres has no basis in the Act, nor in the material before the Court (PS [54], [59]-[61]).

C. A CONSUMPTION TAX IS NOT AN EXCISE

16. If, contrary to the above, the ZLEV charge is properly characterised as a tax on goods, the plaintiffs (and the Commonwealth) concede that it is a tax on the consumption of goods (rather than a tax "on the production, manufacture, sale or distribution of goods") (PS
10 [46]; CS [6], [47]). The state of the law is clear — a consumption tax, namely a tax on "the act of the person in possession of the goods in using them",[8] is not a duty of excise.

C.1 Current state of the law on s 90

17. The following core propositions about s 90 are well established:

17.1. *First*, three years after Federation, this Court unanimously held that an excise was a duty imposed upon the production or manufacture of goods.[9]

17.2. *Second*, decisions of this Court over subsequent decades have charted a trajectory of steady expansion[10] of the meaning of the term, culminating in the 1990s, when majorities of this Court in *Capital Duplicators* and *Ha* held that excise had a wider meaning, being an inland tax "on the production, manufacture, sale or
20 distribution of goods, whether of foreign or domestic origin" (***Ha* formulation**).[11] As the *Ha* majority explained, excise duties are therefore a tax "on goods", in the sense that they are a tax on one of the *aforementioned* "step[s] taken in dealing

the State)"; the accompanying note states that the levy is not payable "on an area of private land that is not open to or used by the public"). Both Acts will become operative on the earlier of 1 July 2027 or the date on which the relevant Minister or Treasurer is reasonably satisfied that battery electric vehicles constitute 30% of new vehicle sales in the jurisdiction: see *Electric Vehicles (Revenue Arrangements) Act*, s 9, Sch 1 (definition of "relevant date"), Sch 2, cl 1; *Motor Vehicles (Electric Vehicle Levy) Amendment Act*, s 2(1)-(2). Following a change of government at the South Australian general election earlier this year, the government introduced the *Motor Vehicles (Electric Vehicle Levy) Amendment Repeal Bill 2022* (SA), but the Bill has not yet been passed. The New South Wales scheme expressly contemplates the possibility of interstate revenue sharing: see *Electric Vehicles (Revenue Arrangements) Act*, s 27; see also New South Wales, *Hansard*, Legislative Council, 14 October 2021, 6110-6112.

[8] *Dickenson's Arcade* (1974) 130 CLR 177 at 187 (Barwick CJ).

[9] *Peterswald v Bartley* (1904) 1 CLR 497 at 509. This (and other matters identified in Part E.1 below) runs contrary to the proposition that excise had "no clearly established meaning" at Federation (cf CS [7]).

[10] Or erosion: see *Dickenson's Arcade* (1974) 130 CLR 177 at 218 (Gibbs J); PS [9].

[11] *Ha* (1997) 189 CLR 465 at 499 (majority); see also *Capital Duplicators* (1993) 178 CLR 561 at 590 (Mason CJ, Brennan, Deane and McHugh JJ) (**majority**).

with goods" (cf CS [14]-[15], [21], [45]).[12] The *Ha* formulation remains binding authority on what constitutes an excise for the purposes of s 90 of the Constitution. Contrary to CS [8], this Court has never found that "production, manufacture, sale or distribution" is a non-exhaustive list of the steps to which an excise may attach.[13]

17.3. *Third*, the purpose of s 90 was assumed by Dixon J in *Parton v Milk Board (Victoria)* to be "to give the [Commonwealth] Parliament a *real control of the taxation of commodities* and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action".[14] In later cases this has been understood to be a necessary component of free trade between the States.[15] Victoria assumes the correctness of Dixon J's statement for the purposes of Parts C and D of its submissions. However, if the Court re-opens *Dickenson's Arcade* and reconsiders the proper construction of s 90, Victoria submits in Part E that this assumption finds no support in the text, context or history of s 90.

17.4. *Fourth*, as to interpretative approach, the task for the Court in construing s 90 is to give effect to the provision's intended scope of operation.[16] It may be appropriate for s 51(ii), which confers legislative power on the Commonwealth with respect to taxation, to be construed with all the generality that its words permit (CS [9]). Section 90, however, is not a conferral of power, but is more in the nature of a "constitutional limitation" (CS [24]).[17] As such, consistently with the approach taken to the construction of s 92 in *Cole v Whitfield*,[18] s 90 should not be construed with undue breadth (cf CS [9]). Indeed, as explained in Part E below,

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[12] *Ha* (1997) 189 CLR 465 at 499 (majority).

[13] The Commonwealth made essentially the same argument in *Capital Duplicators*: (1993) 178 CLR 561 at 565, 582. Yet, as against that submission, the majority in *Capital Duplicators* (at 590) and *Ha* (1997) 189 CLR 465 at 499 expressed the meaning of excise by reference only to the steps of production, manufacture, sale or distribution.

[14] (1949) 80 CLR 229 at 260 (Dixon J) (emphasis added), quoted in *Ha* (1997) 189 CLR 465 at 495 (majority).

[15] See, eg, *Capital Duplicators* (1993) 178 CLR 561 at 585 (majority), referring to the objective of ensuring that "differential taxes on goods and differential bonuses on the production or export of goods should not divert trade or distort competition". See also *Ha* (1997) 189 CLR 465 at 494-495 (majority); *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

[16] See *Cole v Whitfield* (1988) 165 CLR 360 at 385-393 (the Court). See also Herzfeld and Prince, *Interpretation* (2nd ed, 2020) 412 [17.210]; *Eastman v The Queen* (2000) 203 CLR 1 at [139]-[141] (McHugh J).

[17] See generally *Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 652-653 (Wilson J).

[18] (1988) 165 CLR 360 at 385-393, where the Court determined the (historical) intended operation of s 92, and then assessed whether the section should be given a "wider operation" than the history indicated.

the intended scope of operation of s 90 is certainly no wider than it is at present.

17.5. *Fifth*, in determining whether a tax is imposed on the production, manufacture, sale or distribution of goods, the Court has regard to the practical or substantive operation of the relevant statute as well as to its legal operation (see CS [12]).[19]

C.2 Leave to re-open *Dickenson's Arcade* is required

18. Against this background, on the current state of the law, a consumption tax — which is *not* a tax on the production, manufacture, sale or distribution of goods — is not an excise. That precise proposition has been settled since at least 1974, when it was accepted by five of the six Justices constituting the Court in *Dickenson's Arcade*.[20]

10 19. In this matter, the plaintiffs and the Commonwealth advance two different conceptions of an excise, both of which require an extension of the law. The plaintiffs seek to add "consumption" to the list of steps taken in dealing with goods the taxation of which constitutes an excise (PS [44]). Even more ambitiously, the Commonwealth urges this Court to abandon the settled contours of the *Ha* formulation altogether, and instead conceive of an excise as *any* tax which has a "sufficient connection with goods" (CS [13]). Both conceptions are at odds with authority, including *Dickenson's Arcade*, and acceptance of either requires the grant of leave to re-open that case.

20. The plaintiffs faintly press a submission that leave to re-open *Dickenson's Arcade* is not required because that case did not lay down a legal rule concerning whether consumption
20 taxes are duties of excise (PS [38]). That submission should be rejected. The question of whether consumption taxes are duties of excise was squarely raised in *Dickenson's Arcade*, both by the plaintiffs' primary submission[21] and by New South Wales and Tasmania, intervening.[22] Presumably in answer to the competing arguments raised, all six Justices who heard the matter reasoned to a considered view on whether a consumption tax was an excise. It would be a surprising result if their Honours did so despite that

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[19] *Capital Duplicators* (1993) 178 CLR 561 at 583 (majority); *Ha* (1997) 189 CLR 465 at 498 (majority).

[20] (1974) 130 CLR 177 at 185-186 (Barwick CJ), 209, 213 (Menzies J), 217-223 (Gibbs J), 229-231 (Stephen J), 238-239 (Mason J); cf 196, 204 (McTiernan J). On one view, the proposition has been settled since *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529.

[21] *Dickenson's Arcade* (1974) 130 CLR 177 at 180 (Deane QC). It may be that the passage of Stephen J (at 230) quoted at PS [38] was referring to the plaintiffs' alternative argument that the tax under consideration was one "on the movement of tobacco products into consumption": at 180 (Deane QC).

[22] *Dickenson's Arcade* (1974) 130 CLR 177 at 183 (Aickin QC; Snelling QC).

question not being in issue.[23] As such, leave is required to re-open *Dickenson's Arcade*.

C.3 Leave should be refused

21. Having regard to the four factors identified in *John v Federal Commissioner of Taxation*,[24] leave should be refused.

22. As to the *first* factor, *Dickenson's Arcade* rests upon a principle carefully worked out in a significant succession of cases.[25] In *Parton*, Dixon J held that "a tax on consumers or upon consumption cannot be an excise".[26] While differences of opinion on this point were expressed by Rich and Williams JJ,[27] Dixon J's view gained favour in a series of decisions of this Court in the decades following *Parton*. In particular, the proposition that
10 a tax imposed on consumption is not a duty of excise was accepted by a majority of the Court in *Dennis Hotels Pty Ltd v Victoria*,[28] and it explicitly formed part of the Court's unanimous formulation of an excise in *Bolton v Madsen*.[29] The correctness of the decision in *Bolton* was then accepted in cases including *Anderson's Pty Ltd v Victoria*[30] and *Western Australia v Chamberlain Industries Pty Ltd*.[31] Thus, at the time *Dickenson's Arcade* came to be decided, Gibbs J was able to observe that "[s]ince *Parton* … no member of the Court has dissented from, and almost every member who has had occasion to discuss the matter has expressly affirmed, the proposition that a tax imposed on consumption is not a duty of excise".[32]

23. In *Dickenson's Arcade* itself, as noted above, five of the six Justices constituting the
20 Court held that a tax on consumption was not an excise.[33] In so doing, their Honours gave the "very greatest weight" to the fact that "on this issue *unanimity* has been reached after a fluctuation of judicial opinion".[34] Fifteen years later, Brennan J opined in *Philip*

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23 In any event, following *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, there may be a question about the strength with which the McHugh J dictum quoted in PS [38] is to be applied: see at [35]-[36] (Kiefel CJ, Gageler, Keane and Gleeson JJ); cf [198] (Edelman J).

24 (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

25 *John* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

26 (1949) 90 CLR 229 at 261.

27 (1949) 90 CLR 229 at 252-253; see also PS [11].

28 (1960) 104 CLR 529 at 540-541 (Dixon CJ), 559-560 (Kitto J), 573 (Taylor J), 589-590 (Menzies J); see also at 556 (Fullagar J).

29 (1963) 110 CLR 264 at 271 (the Court).

30 (1964) 111 CLR 353 at 364-365 (Barwick CJ), 373 (Kitto J), 376 (Taylor J), 377 (Menzies J).

31 (1970) 121 CLR 1 at 13 (Barwick CJ), 25 (Menzies J), 28 (Windeyer J), 35-36 (Walsh J).

32 (1974) 130 CLR 177 at 221.

33 (1974) 130 CLR 177 at 185-186 (Barwick CJ), 209, 213 (Menzies J), 217-223 (Gibbs J), 229-231 (Stephen J), 238-239 (Mason J); cf 196, 204 (McTiernan J).

34 *Dickenson's Arcade* (1974) 130 CLR 177 at 221 (Gibbs J) (emphasis added); see also at 185-186 (Barwick CJ), 209 (Menzies J), 230 (Stephen J), 239 (Mason J).

Morris Ltd v Commissioner of Business Franchises (Victoria) that "[i]f there be any rock in the sea of uncertain principle, it is that a tax on a step in the production or distribution of goods *to the point of receipt by the consumer* is a duty of excise".[35]

24. As such, it cannot be doubted that *Dickenson's Arcade* was good law at the time of *Capital Duplicators* and *Ha* (cf PS [14]; CS [27], [30]). In both cases, against submissions from the Commonwealth,[36] the majority recognised that the prevailing authority of the Court was that "a tax in respect of goods at any step in the production or distribution *to the point of consumption* is an excise".[37] Indeed, in both cases, applications to re-open *Dickenson's Arcade* were rejected by the Court, in circumstances
10 where the criterion of liability test was no longer the sole governing test (cf CS [30]).[38] There is no good reason why leave should now be granted to allow *Dickenson's Arcade* to be re-opened in circumstances where four previous attempts to do so have failed,[39] and the point of principle has long been settled.

25. As to the *second* factor, Victoria accepts that the reasoning of the Justices forming the majority differed in some respects. However, those differences cannot overcome the overwhelming weight of judicial authority identified at [22]-[23] above, in which this Court has either affirmed *Dickenson's Arcade* or refused to doubt its correctness. So much was recognised by the majority in *Capital Duplicators*, who observed that differences in the reasons of earlier decisions was "not an adequate ground for now
20 disregarding the significance of the Court's repeated refusal to depart from … *Dickenson's Arcade*".[40]

26. As to the *third* factor, the only "inconvenience" said by the plaintiffs to have been caused by *Dickenson's Arcade* is the emergence of a so-called "anomaly" in s 90 (in essence, a discrepancy between s 90's purported purpose and scope of operation: PS [22]-[28]). The asserted inconvenience, as far as it goes, is of no moment. As noted above, the view that a consumption tax is not an excise has prevailed since at least *Dickenson's Arcade*.

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35 (1989) 167 CLR 399 at 445 (emphasis added).

36 *Capital Duplicators* (1993) 178 CLR 561 at 565-566; Commonwealth's submissions in *Ha* at [1.2], [4.1].

37 *Capital Duplicators* (1993) 178 CLR 561 at 583, 587 (majority) (emphasis added); see also *Ha* (1997) 189 CLR 465 at 489 (majority).

38 *Capital Duplicators* (1993) 178 CLR 561 at 583, 591-593 (majority); *Ha* (1997) 189 CLR 465 at 499, 504 (majority).

39 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316 (Gibbs CJ, Mason, Murphy, Wilson, Brennan and Dawson JJ); *Philip Morris* (1989) 167 CLR 399 at 424-425 (Mason CJ and Deane J), 472 (Dawson J); *Capital Duplicators* (1993) 178 CLR 561 at 591-593 (majority); *Ha* (1997) 189 CLR 465 at 501, 504 (majority).

40 *Capital Duplicators* (1993) 178 CLR 561 at 593 (majority).

Simultaneously, the purpose attributed to s 90 has remained materially unchanged since *Parton*. In those circumstances, it must be that the majorities in *Capital Duplicators* and *Ha* either did not consider it anomalous for consumption taxes to fall outside the concept of an excise, or did not consider any anomaly sufficiently concerning to depart from the overwhelming weight of authority. *Dickenson's Arcade* has in fact achieved the "useful" result of preserving the federal compact sought to be effected by s 90.[41]

27. As to the *fourth* factor, the plaintiffs invert the inquiry as to whether *Dickenson's Arcade* has "not been independently acted on in a manner which militate[s] against reconsideration" by implying that something may be drawn from the absence of responsive material in the special case (PS [42]).[42] The plaintiffs bear the burden of demonstrating, other than by mere assertion, that the decision has "*not been*" relevantly acted upon,[43] and they have elected not to do so by use of the special case procedure.

28. In any case, *Dickenson's Arcade* has been independently acted on. The States and Territories have legislated in reliance upon an understanding of the law that has been long settled: that is, that a tax on goods after they have reached the hands of consumers is not an excise.[44] In circumstances where it is not clear what form any departure from *Dickenson's Arcade* would take, it is not possible to identify in any comprehensive way the categories of charge that may be called into question as a result. However, they may include duties on the transfer or conveyance of goods as part of dutiable transactions, motor vehicle duties and vehicle registration charges, commercial passenger vehicle levies, gaming machine levies and "point of consumption" betting taxes, and waste disposal levies, the loss of which could have "a marked effect on the capacity of the States to raise revenue for government".[45]

29. For these reasons, leave to re-open *Dickenson's Arcade* should be refused. A refusal of leave would dispose of this case in its entirety.

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41 See *Dickenson's Arcade* (1974) 130 CLR 177 at 222 (Gibbs J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 617-618 (Gibbs CJ); *Capital Duplicators* (1993) 178 CLR 561 at 605-606 (Dawson J).

42 *John* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ). See also *HC Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 501 (Mason J).

43 *John* (1989) 166 CLR 417 at 438-439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) (emphasis added); *Williams v The Commonwealth [No 2]* (2014) 252 CLR 416 at [65] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

44 See, eg, *Commissioner for ACT Revenue v Kithock* (2000) 102 FCR 42 at [21], [23], [31]; see, by way of analogy, *Minogue v Victoria* (2019) 268 CLR 1 at [24].

45 *HC Sleigh* (1977) 136 CLR 475 at 501 (Mason J). As adverted to in CS [24], modern technology may facilitate additional methods of tracking the consumption of goods, which may in turn affect future legislative decisions.

D. If re-opened, *Dickenson's Arcade* should be affirmed

30. If, contrary to the submissions above, the Court grants leave to re-open *Dickenson's Arcade*, it should affirm that decision. There are three principled reasons why an excise should continue to mean a duty on the production, manufacture, sale or distribution — but not consumption — of goods.

31. *First*, a tax on production, manufacture, sale or distribution is conceptually distinct from a tax on consumption. The etymology of the word excise was explained as follows in Palgrave's *Dictionary of Political Economy* in 1894:[46]

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> The word *excise* (Latin, *excido*) signifies etymologically *something cut off*; as an excise duty may in effect be considered something cut off or deducted, for the benefit of the state, from the price of the article as paid by the consumer … The price, therefore, that he actually pays includes the duty; whence it follows that the duty itself is something deducted or subtracted from the actual price paid. The price in fact is divided into two parts, one part being subtracted from the whole for the benefit of the state, the remainder going to the vendor.

32. While a tax imposed on consumption may affect the overall financial burden of owning and using a good, it cannot be conceptualised as a component of the purchase price: it is not capable of being "deducted", "subtracted" or "excised" from the price paid to obtain the good. Instead, predicting the economic effect of a consumption tax on purchase price is necessarily speculative; it involves making complex assumptions about the impact of a tax on demand and, if there is a reduced demand, the impact of that reduction on purchase price. No such speculation is involved in a tax which is *excised* from the purchase price at the point of sale.

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33. This conceptual distinction has been recognised in the authorities. The *Ha* majority referred to taxes on production, manufacture, sale or distribution as taxes on "goods as integers of commerce".[47] In *Dickenson's Arcade*, Stephen J explicitly contrasted such taxes to consumption taxes, opining that excises "are duties imposed in respect of commercial dealings in commodities and are, in their essence trading taxes; a tax on consumption is of its nature not such a tax".[48] A similar distinction appears to have underpinned Gibbs J's finding, based on authoritative secondary materials, that "established usage (notwithstanding some divagations) favours the conclusion that a tax

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46 *Dictionary of Political Economy* (1894), Vol 1, 786-787 (emphasis in original). See also *Beeton's Dictionary of Universal Information* (1828) 751; Bateman, *The Laws of Excise* (1843) 6; Owens, *A History of the Excise* (1879) 1.

47 *Ha* (1997) 189 CLR 465 at 497 (majority).

on consumption of goods is not a duty of excise".[49]

34. *Second*, this conceptual distinction is reinforced by the constitutional context of s 90. In particular, s 93(i) of the Constitution relevantly refers to "duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption". In so doing, s 93(i) explicitly draws a distinction between acts of *production and manufacture* (in respect of which duties of excise may be levied) and the act of *consumption*, which is necessarily distinct from, and subsequent to, those acts.

35. *Third*, the observation in *Capital Duplicators* that the phrase "duties of customs and of excise" "exhaust[s] the categories of taxes on goods" does not follow from acceptance of the purpose of s 90 articulated by Dixon J in *Parton* (cf PS [13], [23]; CS [15]).[50] The submissions of the plaintiffs and the Commonwealth to the contrary take that descriptive observation in *Capital Duplicators* out of context and treat it as a constitutional rule which defines the boundaries of s 90.[51] Reading the majority's observation in context, it is clear that it was made in a part of their Honours' judgment rejecting the narrow meaning of excise adopted in *Peterswald*; namely, a duty imposed upon the *production* or *manufacture* of goods. That observation cannot simply be transposed and applied to justify a further extension of the meaning of excise to include a tax on consumption, given the conceptual difference identified above between taxes on consumption and taxes on steps prior to that point.

36. It would be particularly inappropriate to read that observation as being determinative of the status of consumption taxes under s 90 in circumstances where their Honours expressly acknowledged that the status of consumption taxes was "unnecessary … to consider" in the context of that case.[52] Similarly, Dixon J's articulation of the purpose of s 90 in *Parton* appeared immediately before his Honour's conclusion that a consumption tax "cannot be an excise".[53] Consistently with [26] above, it is therefore implicit that — like the majority in *Capital Duplicators* — his Honour did not consider that a conception of excise which only extended to steps taken in relation to goods before they reached the

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48 (1974) 130 CLR 177 at 231; see also at 239 (Mason J). See also *Parton* (1949) 80 CLR 229 at 259 (Dixon J).

49 (1974) 130 CLR 177 at 222.

50 *Capital Duplicators* (1993) 178 CLR 561 at 590 (majority), quoted in *Ha* (1997) 189 CLR 465 at 488 (majority).

51 See *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at [152] (Gordon J).

52 *Capital Duplicators* (1993) 178 CLR 561 at 590 (majority).

53 (1949) 80 CLR 229 at 261.

consumer undermined the purpose of s 90 (cf PS [24]-[26]; CS [22]).

37. If *Dickenson's Arcade* is re-opened, it should be affirmed, such that if the ZLEV charge imposes a tax on the consumption of goods, it is valid.

E. AN EXCISE IS A TAX THAT FALLS SELECTIVELY ON LOCAL GOODS

38. In the alternative to Part D above, if the Court grants leave to re-open *Dickenson's Arcade*, Victoria seeks leave to re-open *Capital Duplicators* and *Ha* insofar as those cases hold that an excise is a tax "on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin".[54] A critical reappraisal of the proper interpretation of s 90 is warranted in circumstances where the plaintiffs and the
10 Commonwealth seek to substantially broaden the concept of an excise, and in so doing expose the extent to which the *Ha* formulation is unmoored from the text of s 90, read in light of its "place in the structure of the Constitution and its history".[55]

39. If leave is granted, "excise" should be understood to have the meaning preferred by the minority Justices in *Capital Duplicators* and *Ha*; namely, a tax that falls selectively on locally produced or manufactured goods, in the sense that it falls on such goods rather than imported goods or falls on all goods indiscriminately.[56] In this context, "locally" refers to goods produced within the State or Territory levying the tax, or within Australia more broadly, taxes on either of which may undermine the Commonwealth's tariff policy (in the sense described in [47] below).[57] On this approach, the ZLEV charge is not an
20 excise, as it does not fall selectively upon goods produced in Australia (ASCB 44 [56], [58]).

40. The balance of this Part addresses: *first*, the proper construction of s 90; and *second*, the factors relevant to the application to re-open *Capital Duplicators* and *Ha*.

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[54] *Ha* (1997) 189 CLR 465 at 499 (majority). See also *Capital Duplicators* (1993) 178 CLR 561 at 590 (majority).

[55] *Re Day [No 2]* (2017) 263 CLR 201 at [247] (Nettle and Gordon JJ), citing *McGinty v Western Australia* (1996) 186 CLR 140 at 230-231 (McHugh J).

[56] *Ha* (1997) 189 CLR 465 at 514-515 (Dawson, Toohey and Gaudron JJ) (**minority**); see also *Capital Duplicators* (1993) 178 CLR 561 at 609 (Dawson J), 629 (Toohey and Gaudron JJ). For simplicity, in Part E, references to the "production" of goods should be understood to refer to the "manufacture or production" of such goods.

[57] Some early proponents of this approach suggested that the relevant criterion was whether the tax fell selectively on goods produced in the *State or Territory* levying the excise: see *Hematite Petroleum* (1983) 151 CLR 599 at 638 (Murphy J). The minority in *Ha* accepted that such a tax would be a duty of excise (at 512). Although the question of whether a tax falling selectively on goods produced in *Australia* more broadly was not definitively answered by the minority in *Ha* (at 512-513), Toohey and Gaudron JJ noted in *Philip Morris* (1989) 167 CLR 399 that the "overwhelming weight of authority favours" that conclusion (at 480). This represents the correct conclusion, because Commonwealth tariff policy may be undermined by a State or Territory imposing a tax selectively on Australian-made goods.

E.1 The proper construction of s 90

Text: At Federation, "excise" meant a tax on locally produced or manufactured goods

41. The identification of the meaning of the words used in the Constitution at the time of Federation is an "essential step" in the task of construction.[58] Yet, since *Matthews v Chicory Marketing Board (Victoria)*,[59] the prevailing approach to construing s 90 has been to disregard the constitutional text on the assumption that excise had "no clearly established meaning when the Constitution was brought into existence".[60] With respect, that approach should no longer be countenanced. At the time of Federation, "excise" did have an established meaning, being a tax on locally produced goods.

10 42. That "excise" had an established meaning at the time of Federation emerges from contemporaneous secondary materials. Quick and Garran explained that the "fundamental conception" of excise was "a tax on articles produced or manufactured in a country" (that is, the country in which the tax was imposed).[61] They further noted that in the taxation of certain luxury items:[62]

> it has been the practice to place a certain duty on the importation of these articles and a *corresponding or reduced duty on similar articles produced or manufactured in the country*; and this is the sense in which excise duties have been understood in the Australian colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth.

20 43. Several other pre-Federation sources similarly suggest that an excise is a tax on the local production of goods. For example, Mill referred to duties of excise as "[t]axes on commodities … on production within the country".[63] The *Encyclopaedia Britannica* described excise duties as "a duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers",[64] and that definition was adopted by the *Oxford English Dictionary*.[65] *McCulloch's Commercial Dictionary*,

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[58] *Singh v The Commonwealth* (2004) 222 CLR 322 at [159] (Gummow, Hayne and Heydon JJ). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 149 (Knox CJ, Isaacs, Rich and Starke JJ); *Cole* (1988) 165 CLR 360 at 385 (the Court).

[59] (1938) 60 CLR 263.

[60] *Capital Duplicators* (1993) 178 CLR 561 at 584 (majority). See also *Ha* (1997) 189 CLR 465 at 493 (majority) and PS [18]; CS [7].

[61] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 837.

[62] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 837 (emphasis added).

[63] J S Mill, *Political Economy* (1848) Book V, c IV, sec 1, 388.

[64] Robert Somers, *Encyclopaedia Britannica*, 9th ed (1878) Vol 8, 797 ("Excise"). See also Sir Robert Giffen, *Encyclopaedia Britannica*, 11th ed (1911) Vol 26, 460 ("Taxation").

[65] See *Oxford English Dictionary*, 1st ed (1897) Vol 3, 379 ("Excise", sense 2). The definition remains unchanged in the current online edition, most recently updated in September 2022. The first sense of the

published in 1880, defined an excise as "[t]he name given to the duties or taxes laid on certain articles produced and consumed at home".[66] Similar definitions appear in a number of other contemporaneous sources.[67]

44. Consistently with the meaning reflected in secondary sources, the term "excise" was used uniformly in colonial legislation at Federation to describe taxes on the production of goods within the colony itself, other than goods that were to be exported.[68] And, although there was limited discussion of the meaning of the term "excise" in the Convention Debates, the Debates "support the view that 'duties of excise' were understood to be duties chargeable upon the local manufacture and production of commodities".[69]

10 45. Presumably for these reasons, the Court in *Peterswald* unanimously held just three years after Federation that "excise" had "a distinct meaning in the popular mind" in Australia and was "intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured".[70]

46. The doubt expressed by Dixon J in *Matthews* about the correctness of the holding in *Peterswald* appeared to stem from two concerns, neither of which justified disregarding the substantial evidence that "excise" had a distinct meaning in Australia at Federation.

46.1. *First*, Dixon J had regard to the history of the term in England, and in particular Blackstone's definition of "excise" from 1768, which suggested that the term had a protean quality.[71] His Honour should not have preferred a British text that

20 predated Federation by more than a century over the materials identified above,

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term in both the 1897 and current edition of the Oxford English Dictionary is "any toll or tax". It is plain that the term is not used in that broad sense in s 90.

66 *McCulloch's Commercial Dictionary* (London, 1880) 599.

67 See Palgrave, *Dictionary of Political Economy* (1894) Vol 1, 786-788; Knight, *The English Cyclopaedia* (1860) Div 4, Vol 3, 1003; *Wharton's Law Lexicon*, 9th ed (1892) 281; *Beeton's Dictionary of Universal Information* (1828) 751; Bateman, *The Laws of Excise* (1843) 6 (footnote (a)); Bateman, *The Excise Officer's Manual*, 2nd ed (1852) 1.

68 See **NSW:** *Tobacco Act 1884* (NSW), s 4; *Beer Duty Act 1887* (NSW), ss 7, 25; *Excise Reduction Act 1900* (NSW); **Qld:** *Tobacco Act 1894* (Qld), s 9; *Beer Duty Act 1897* (Qld), ss 11, 38; *Customs and Excise Duties Reduction Act 1900* (Qld), s 2; **SA:** *Beer Duty Act 1894* (SA), ss 3(1), 40; *Distillation Act 1884* (SA), ss 3, 46, 51; **Tas:** *The Cigar and Cigarette Duty Act 1895* (Tas), s 4; *The Customs Act 1897* (Tas), s 191; **Vic:** *Beer Duty Act 1892* (Vic), ss 3, 40; *Customs and Excise Duties Act 1890* (Vic), ss 111, 178, 189; *Customs and Excise Duties Act 1895* (Vic), ss 2(2), 6(3), 9, Schs 3 and 6; **WA:** *Beer Duty Act 1898* (WA), ss 3, 41, read with Sch 1.

69 *Capital Duplicators* (1993) 178 CLR 561 at 607 (Dawson J). See also *Official Report of the National Australasian Convention Debates*, Sydney, 1891 at 349, 354, 361-368; Adelaide, 1897 at 600-602, 845-849, 857-858, *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1897 at 1065-1068; Melbourne, 1898 at 910-912, 917-920, 923-924, 936-938, 975-980; John M Williams, "Come in Spinner: Section 90 of the Constitution and the Future of State Government Finances" (1999) 21 *Sydney Law Review* 627, 637.

70 (1904) 1 CLR 497 at 509.

71 *Matthews* (1938) 60 CLR 263 at 294-296.

which were published at the time of Federation and some of which specifically addressed the Australian context.[72]

46.2. *Second*, Dixon J referred to an 1829 Tasmanian proclamation which imposed duties of excise on spirits imported directly from New South Wales in addition to those distilled in Tasmania.[73] The inclusion of New South Wales in that proclamation likely reflected the fact that Tasmania had become a separate colony from New South Wales only four years earlier.[74] In any event, Dixon J should not have given weight to the proclamation, which had ceased to have effect by 1836,[75] in circumstances where the duties of excise levied by all colonies (including
10 Tasmania) at Federation were solely taxes on goods produced within that colony.

Purpose: The effective control of tariff policy

47. Even if purpose is significant (or decisive) in construing s 90, its purpose is properly understood — consistently with the established meaning of "excise" at the time of Federation — as being to reserve for the Commonwealth alone the power to determine the extent to which a common external tariff would be used to either protect Australian industry or promote free trade. That purpose is discernible from a close consideration of the complementary way in which s 90 was designed to operate with s 92.

48. Two of the principal drivers of Federation were the creation of a common external tariff to bind the States in a customs union, and the creation of an internal free trade area
20 among the States.[76] These "twin objectives" gave rise to s 90 (to achieve a common external tariff) and s 92 (to achieve freedom of trade among the States).[77] As to the former, to resolve pre-Federation differences in the colonies' fiscal policies, s 90 gave the Commonwealth exclusive control over customs duties, to ensure that it could determine the level of protective tariffs that would be imposed on imported goods.[78] Then, to ensure

[72] See especially Palgrave (ed), *Dictionary of Political Economy* (1894), Vol 1, 787 and Knight, *The English Cyclopaedia* (1860) Div 4, Vol 3, 1003, which suggest that the definition had taken on a more confined meaning by the late 19th century even in England.

[73] *Matthews* (1938) 60 CLR 263 at 299, citing Mills, *Taxation in Australia* (1925), 173.

[74] Mills, *Taxation in Australia* (1925), 173-174.

[75] Mills, *Taxation in Australia* (1925), 174. See also *An Act for the Regulation of Distilleries and for Imposing Duties on Spirits Distilled Therein 1836* (Tas).

[76] *Cole* (1988) 165 CLR 360 at 386; *Ha* (1997) 189 CLR 465 at 506 (minority).

[77] *Philip Morris* (1989) 167 CLR 399 at 466 (Dawson J); *Capital Duplicators* (1993) 178 CLR 561 at 609 (Dawson J); *Ha* (1997) 189 CLR 465 at 506 (minority). See also *Cole* (1988) 165 CLR 360 at 385-387 (the Court).

[78] *Ha* (1997) 189 CLR 465 at 506 (minority); Sir Harry Gibbs, "'A Hateful Tax'? Section 90 of the Constitution" (1995) 5 *Upholding the Australian Constitution: The Samuel Griffith Society Proceedings* 121, 3; Hanks, *Constitutional Law in Australia* (1991), 242.

that no State could frustrate the Commonwealth's tariff policy by increasing or reducing the cost of local goods, the provision also gave the Commonwealth exclusive control over duties of excise (which could be expected to increase the price of such goods relative to imported goods) and bounties (which could be expected to decrease the price of such goods by subsidising the cost of local manufacture and production).[79] This account of the purpose of s 90 is reflected in the Convention Debates.[80]

49. In this context, there are at least three reasons why s 90 does not have the wide purpose articulated by Dixon J in *Parton* of giving the Commonwealth "real control of the taxation of commodities" (cf PS [19]-[21]; CS [11]).[81] Nor should it be understood to be
10 intended to give effect to some broader free trade objective.[82]

49.1. *First*, the fact that s 92 gives effect to the free trade objective underpinning Federation in a particular, confined way (focusing upon the absence of discrimination and protectionism[83]) militates against the view that s 90 was intended to achieve some broader free trade objective by giving the Commonwealth exclusive control over the taxation of all goods.

49.2. *Second*, the current operation of s 90 (which gives effect to the purpose stated in *Parton*) means that the sphere of operation of s 92 is artificially confined, in that s 92 has no operation in respect of State and Territory taxes imposed upon the production, manufacture, distribution or sale of goods (those taxes already having
20 been rendered unconstitutional by s 90). That result is surprising given that a key objective of s 92 was to "deny to [the] Commonwealth and States alike a power to

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79 *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 141 (Stephen J).

80 *Official Report of the National Australasian Convention Debates,* Sydney, 1891 at 346-347 (Mr Munro); 366 (Mr Deakin); Adelaide, 1897 at 836 (Mr McMillan); *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 1898 at 936-937, 941, 978 (discussing s 55). The majority in *Ha* accepted that the "original purpose" of s 90 at the 1891 Convention was to give the Commonwealth effective control of tariff policy: (1997) 189 CLR 465 at 495. However, their Honours considered that an amendment at the 1897 Convention in Adelaide, which removed from the words "duties of excise" the qualifying phrase "upon goods the subject of customs", changed the purpose of the provision: at 495-496. The difficulty with that conclusion is that the amendment said to effect this shift in the purpose of the provision was only discussed briefly, much of which was premised on the incorrect assumptions that s 90 was the source of the Commonwealth's power to impose duties of excise (rather than s 51(ii)), and that removing the qualification was necessary to ensure that Parliament had unfettered power to impose such duties: *Official Report of the National Australasian Convention Debates,* Adelaide, 1897 at 835-836.

81 (1949) 80 CLR 229 at 260.

82 Cf *Capital Duplicators* (1993) 178 CLR 561 at 585 (majority), referring to the objective of ensuring that "differential taxes on goods and differential bonuses on the production or export of goods should not divert trade or distort competition". See also *Ha* (1997) 189 CLR 465 at 494-495 (majority); *Betfair* (2008) 234 CLR 418 at [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

83 *Cole* (1988) 165 CLR 360 at 392 (the Court); see also *Palmer v Western Australia* (2021) 95 ALJR 229.

prevent or obstruct the free movement of … goods … across State boundaries”.[84]

49.3. *Third*, States can regulate their internal markets in numerous ways that could be expected to affect the price of goods, and thereby affect the market for those goods (for example, by imposing land taxes or payroll taxes, or by regulating transport, health or safety, each of which could increase the cost of manufacture or production).[85] This casts real doubt on: (i) whether a broad free trade objective could be achieved on *any* view of s 90; and (ii) the assertion that preventing States and Territories from imposing taxes on goods is necessary to guarantee freedom of interstate trade, particularly given that it is well accepted that States can 10 regulate their internal markets via non-discriminatory measures without contravening the free trade guarantee in s 92 (cf PS [21]; CS [11]).[86]

Constitutional context

50. Finally, constitutional context confirms both that “excise” is used in s 90 in accordance with its established meaning at the time of Federation (that is, a tax on locally produced goods), and that s 90 was intended to serve the narrow purpose of giving the Commonwealth effective control over tariff policy. In relation to the former, as noted above, s 93(i) refers to “duties of excise paid on *goods produced or manufactured in a State*” (emphasis added). The italicised words are clearly descriptive of what is an “excise” — there is no reason to suppose that they were intended to differentiate one type 20 of excise from any other.[87] In relation to the latter, in addition to the relationship between ss 90 and 92 addressed above, context confirms that the Commonwealth’s exclusive power to levy duties of excise was a corollary of its power to levy duties of customs. Its power to levy duties of excise became exclusive only upon the imposition of uniform duties of customs,[88] and the term “excise”, in each of the seven sections in which it appears in the Constitution, is always collocated with a reference to “customs”.[89]

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84 *Cole* (1988) 165 CLR 360 at 391 (the Court).
85 See *Capital Duplicators* (1993) 178 CLR 561 at 612-613 (Dawson J). See also *Hematite Petroleum* (1981) 151 CLR 599 at 617 (Gibbs CJ).
86 *Cole* (1988) 165 CLR 360 at 394, 399 (the Court).
87 *Ha* (1997) 189 CLR 465 at 505 (minority); cf at 493 (majority).
88 Constitution, s 90. See also *Ha* (1997) 189 CLR 465 at 506 (minority).
89 See ss 55, 69, 85, 86, 87, 90, 93. See also *Ha* (1997) 189 CLR 465 at 506 (minority); *Hematite Petroleum* (1983) 151 CLR 599 at 615 (Gibbs CJ).

E.2 Leave to re-open *Capital Duplicators* and *Ha* should be granted

51. Leave should be granted to re-open *Capital Duplicators* and *Ha* so that this Court can give effect to the proper construction of s 90.[90] Contrary to the Commonwealth's submission (CS [33], [35]), Victoria's re-opening application is not merely an attempt to re-agitate materially the same argument as was rejected in those cases:

    51.1. *First*, Victoria's application only arises if the Court grants leave to re-open *Dickenson's Arcade* in order to extend the meaning of excise. For the reasons given in Part E.1 above, the application to re-open *Dickenson's Arcade* highlights the extent to which the prevailing approach to s 90 has become unmoored from the constitutional text, context and purpose, such that, if *Dickenson's Arcade* is re-opened, a more fundamental reconsideration of s 90 is warranted.

    51.2. *Second*, and relatedly, the plaintiffs and the Commonwealth invite the Court to reconsider the correctness of Dixon J's reasoning in *Parton*, which is the origin of the conception of excise affirmed in *Dickenson's Arcade* (PS [31]-[34]; CS [26]-[27]). The reasoning in *Parton* cannot be segmented. Given that Dixon J's articulation of purpose in *Parton* underpinned the reasoning of the majorities in *Capital Duplicators* and *Ha*,[91] that aspect of his Honour's reasons should also be reconsidered.

    51.3. *Third*, given the close connection between ss 90 and 92 (see [47]-[49] above), the Court's recent confirmation in *Palmer v Western Australia* that discrimination is the cornerstone of both limbs of s 92 invites reconsideration of the extent to which discrimination is relevant to s 90.[92]

52. Leave to re-open *Capital Duplicators* and *Ha* should be granted having regard to each of the *John* factors.[93] That is especially so because the decisions involve "question[s] of … 'vital constitutional importance'", with "far reaching" consequences;[94] the doctrine of

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[90] Although these submissions necessarily call into question obiter statements in *Matthews* and *Parton*, upon which the majorities in *Capital Duplicators* and *Ha* relied, it is not necessary to re-open either of those decisions. However, if it is necessary to re-open any other decision of this Court, Victoria seeks that leave.

[91] *Capital Duplicators* (1993) 178 CLR 561 at 586 (majority); *Ha* (1997) 189 CLR 465 at 495 (majority).

[92] (2021) 95 ALJR 229.

[93] *John* (1989) 166 CLR 417 at 438-439.

[94] *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [68] (French CJ); *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630 (Aickin J).

precedent necessarily being less rigid in those circumstances.[95]

53. As to the *first* factor, those cases do not rest upon a principle carefully worked out in a significant succession of cases. To the contrary, the approach of the majorities in *Capital Duplicators* and *Ha* is largely founded on two premises, neither of which withstands scrutiny. The first, originating in Dixon J's judgment in *Matthews*, is that "excise" had "no clearly established meaning when the Constitution was brought into existence", so the purpose of the provision should be given decisive weight in construing s 90.[96] This overlooks substantial evidence that the term had a particular meaning in Australia at Federation (see [41]-[46] above). The second premise is that Dixon J's assumption as to the purpose of s 90 in *Parton* was correct. That assumption finds no support in the text, context or history of s 90 (see [47]-[49] above). The fact that both premises have long been features of the s 90 jurisprudence does not make them sound.

54. As to the *second* factor, Victoria acknowledges that the reasoning of the Justices who formed the majorities in *Capital Duplicators* and *Ha* is not different. In each case, a four-judge majority wrote a single judgment. However, having regard to the slimness of the majorities, the strength of the dissenting judgments in both cases, and the other matters addressed at [41]-[59], this factor does not justify refusing leave to re-open.

55. As to the *third* factor, *Capital Duplicators* and *Ha* achieved no useful result and have caused considerable inconvenience to the States and Territories. Following *Ha*, consistently with the majority's recognition that the decision would have "the most serious implications for the revenues of the States and Territories",[97] the States and Territories were no longer able to levy taxes which then comprised between 14% and 31% of their total taxation revenue (ASCB 44-45 [60], [62]). While the lost revenue was initially recouped through safety-net payments (CS [38]), and the Commonwealth has continued to make payments to the States and Territories over time (ASCB 48-49 [74]-[80]), there have been significant consequences for the autonomy of the States and Territories, given their increasing financial dependence upon the Commonwealth (including by way of specific purpose payments, which cannot be repurposed to fund emerging or pressing priorities). In all jurisdictions other than Western Australia, the

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[95] *Richardson v Forestry Commission* (1988) 164 CLR 261 at 321-322 (Dawson J). See also *Queensland v The Commonwealth* (1977) 139 CLR 585 at 593 (Barwick CJ), 608 (Jacobs J); *Re Tyler; Ex Parte Foley* (1994) 181 CLR 18 at 38 (McHugh J).

[96] *Capital Duplicators* (1993) 178 CLR 561 at 584 (majority). See also *Matthews* (1938) 60 CLR 263 at 293 (Dixon J); *Ha* (1997) 189 CLR 465 at 493 (majority).

[97] *Ha* (1997) 189 CLR 465 at 503 (majority).

proportion of Commonwealth payments to State and Territory own-source taxation revenue markedly increased between 1997 and 2021 (ASCB 285-292; cf CS [39]).

56. In addition, the States and Territories have lost the ability to levy taxes on goods as a behavioural lever to effect public policy goals (see, eg, ASCB 45-46 [63]). This restricts State and Territory policy choices in a way that may affect future expenditure. For example, the inability to impose a tax on the manufacture, production, sale or distribution of goods such as tobacco and liquor may, as a matter of logic, necessitate increased future spending on health.

57. The decisions also limit the range of options available for State and Territory tax reform. One result of the ever-widening definition of excise "must surely tend to be that the States will impose some forms of taxation which, although constitutionally permissible, are less economically desirable than taxes now categorized as duties of excise".[98]

58. These inconveniences arise from the loss of financial autonomy suffered by States and Territories, rather than overall revenue, and so are not mitigated by the fact that the States and Territories can use GST grants for any purpose (cf CS [39]).

59. As to the *fourth* factor, *Capital Duplicators* and *Ha* have not been independently acted on in a manner which militates against reconsideration. Whilst those cases may have formed part of the context which gave rise to the GST, revisiting those decisions would not retrospectively "unpick" one of the strands of the GST settlement (cf CS [41]). The Commonwealth has not explained how that settlement would be in any way impacted by a decision to overturn *Capital Duplicators* and *Ha*.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

60. Victoria estimates that it will require approximately 3.5 hours for oral submissions.

Dated: 24 October 2022

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[98] *Hematite Petroleum* (1983) 151 CLR 599 at 617 (Gibbs CJ).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M61 of 2021

BETWEEN:

CHRISTOPHER VANDERSTOCK
First Plaintiff

KATHLEEN DAVIES
Second Plaintiff

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and

THE STATE OF VICTORIA
Defendant

ANNEXURE TO THE ATTORNEY-GENERAL OF VICTORIA'S SUBMISSIONS

Pursuant to paragraph 3 of *Practice Direction No 1 of 2019*, Victoria sets out below a list of the
20 particular constitutional provisions, statutes and statutory instruments referred to in its submissions.

No	Description	Version	Provisions
1.	Commonwealth Constitution	Current	ss 51(ii), 55, 69, 85, 86, 87, 90, 92, 93(i)
2.	*Zero and Low Emission Vehicle Distance-based Charge Act 2021* (Vic)	Current	Whole Act
3.	*Electric Vehicles (Revenue Arrangements) Act 2021* (NSW)	Current	ss 6, 9, 11(1)-(3), 27 Sch 1, Sch 2, cl 1
4.	*Motor Vehicles (Electric Vehicle Levy) Amendment Act 2021* (SA)	Current	ss 2, 8
5.	*Tobacco Act 1884* (NSW)	As enacted	s 4
6.	*Beer Duty Act 1887* (NSW)	As enacted	ss 7, 25
7.	*Excise Reduction Act 1900* (NSW)	As enacted	Whole Act
8.	*Tobacco Act 1894* (Qld)	As enacted	s 9
9.	*Beer Duty Act 1897* (Qld)	As enacted	ss 11, 38
10.	*Customs and Excise Duties Reduction Act 1900* (Qld)	As enacted	s 2
11.	*Beer Duty Act 1894* (SA)	As enacted	ss 3(1), 40
12.	*Distillation Act 1884* (SA)	As enacted	ss 3, 46, 51
13.	*The Cigar and Cigarette Duty Act 1895* (Tas)	As enacted	s 4
14.	*The Customs Act 1897* (Tas)	As enacted	s 191
15.	*Beer Duty Act 1892* (Vic)	As enacted	ss 3, 40
16.	*Customs and Excise Duties Act 1890* (Vic)	As enacted	ss 111, 178, 189
17.	*Customs and Excise Duties Act 1895* (Vic)	As enacted	ss 2(2), 6(3), 9, Schs 3 and 6
18.	*Beer Duty Act 1898* (WA)	As enacted	ss 3, 41, Sch 1

19.	*An Act for the Regulation of Distilleries and for Imposing Duties on Spirits Distilled Therein 1836* (Tas)	As enacted	Whole Act